



JOSHUA SAFRAN

Deputy Port Attorney

Tel. No.: (510) 627-1136

Fax No.: (510) 444-2093

E-Mail: jsafran@portoakland.com

Via E-Mail & U.S. Mail

July 24, 2014

John Bowers, Esq.
Staff Counsel
San Francisco Bay Conservation and Development Commission
50 California Street, Suite 2600
San Francisco, CA 94111

**RE: Restrictions on Conveyance of Port Public Trust Property
Interests for Access Restriction Agreement in Jack London
Square in Oakland, California**

Dear Mr. Bowers:

As you know the Port of Oakland and BCDC are currently negotiating the Port's dedication of a public access restriction on public trust lands, granted by the State and held in trust by the Port, in Oakland, California's Jack London Square.

BCDC has asked that the term of the restriction be permanent. Based on recent discussions with the State Lands Commission¹ and the Attorney General's Office, it is our understanding that the Port may not lawfully dedicate a permanent restriction encumbering such lands. However, it may dedicate a restriction for a term of up to 66 years.

Beginning in 1852, through a series of legislative grants from the State, the City of Oakland acquired all of the right, title, and interest to certain tide and submerged lands located within its boundaries. Through the City's Charter, portions of these public trust lands are within the Port Area and are managed by the Port. These "granted lands" are subject to constitutional, statutory, and common law requirements that impose public trust restrictions on their use and upon the revenues derived from development of these lands. As you may be aware, the grantee of sovereign tide and submerged lands is charged with the duty to administer the trust solely in the interest

¹ The Commission has the statutory responsibility to oversee the management of sovereign public trust lands and assets by legislative grantees, such as the Port, who manage these lands in trust on behalf of the State of California. (Public Resources Code Section 6301 et. seq.; *State of California ex rel. State Lands Commission v. County of Orange* (1982) 134 Cal.App. 3d 20, 23.)

of its beneficiaries, the people of California. As part of that duty, grantees like the Port are prohibited by their legislative grants and "shall not, at any time, grant, convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any purposes whatever." These same legislative grants, however, provide that the Port "may grant franchises thereon for limited periods" but in no event for terms "to exceed 66 years." The subject legislative grants may all be found here: <http://www.sos.ca.gov/granted-lands/Alameda.html>.

For these reasons, the Port Attorney is proposing that the permanent public access restriction language proposed by BCDC be modified to include a term of years not to exceed 66 years.

Thank you for your consideration of this important matter and do not hesitate to contact me further. I understand that Supervising Deputy Attorney General Chris Tiedemann and Deputy Attorney General Joseph C. Rusconi are interested in discussing this matter further. As appropriate, counsel for the State Lands Commission may also be available.

Very truly yours,

Danny Wan
Port Attorney

By


JOSHUA SAFRAN
Deputy Port Attorney

cc: Eric B. Milstein, Senior Staff Counsel,
California State Lands Commission

Joseph C. Rusconi, Deputy Attorney General

Subject: RE: Scott's Restaurant revised public access instrument
Date: Friday, August 8, 2014 at 1:06:30 PM Pacific Daylight Time
From: Joshua Safran
To: John Bowers
CC: Ellen Miramontes, Brad McCrea, Adrienne Klein, Peter S. Prows, Richard Sinkoff, Dave Murtha, Julie Braun, Pam Kershaw, John Briscoe, Michele Heffes, Douglas Herman

Hi John - I know how important the term limitation issue is to BCDC so I'm working to set up a three-way call with the AG's Office, ideally in the next two weeks. Please find below a list of when I'm NOT available during those time frame. I've given this info to the AG too. Are you generally around?

I'm NOT available:

Aug 12 before 1:30pm

Aug 13 before 3:30pm

Aug 15 10am-1pm

Aug 20 before 1:30pm

Aug 21 after 3:00pm

Have a great weekend - JS

From: Joshua Safran
Sent: Thursday, July 24, 2014 1:35 PM
To: 'John Bowers'
Cc: Ellen Miramontes; Brad McCrea; Adrienne Klein; Peter S. Prows; Richard Sinkoff; Dave Murtha; Julie Braun; Pam Kershaw; John Briscoe; Michele Heffes
Subject: RE: Scott's Restaurant revised public access instrument

Letter attached on the 66-year issue.

From: John Bowers [<mailto:johnb@bccdc.ca.gov>]
Sent: Friday, June 27, 2014 1:48 PM
To: Joshua Safran
Cc: Ellen Miramontes; Brad McCrea; Adrienne Klein; Peter S. Prows
Subject: Re: Scott's Restaurant revised public access instrument

Joshua,

I write in response to the most recent changes you have proposed to the draft public access

agreement/guarantee (PAA) for the "public pavilion" site adjacent to Scott's Jack London Seafood Restaurant (SJLSR) at Jack London Square (JLS).

Your first proposed change is the addition of a reference to Port Ordinance No. 3395. The apparent purpose of this change is to make organized events for which the Port issues a permit under this ordinance permissible under the PAA. This change to the PAA would effectively add a new category of permissible public access activities, namely, organized, special events, to the *unorganized* activities ("walking, viewing, sitting, fishing, picnicking") that Special Condition II.B.2 of the permit currently lists. As I pointed out in one of my previous messages, Commission staff lack the authority to agree to provisions in a PAA that deviate in any substantive way from the terms of the permit which the PAA is intended to implement. Accordingly, the action that the Port needs to take if it wishes organized special events to be permissible under the PAA is to apply for and obtain an amendment to permit no. 1985.019B that adds such events to the list of authorized public access activities.

Our preliminary view of the matter is that such an amendment request, subject to certain qualifications, may well be approvable. One concern is that although the events for which permits can be granted under the ordinance generally are required to be ones "to which the general public is invited," as suggested by my inquiry to you and your response thereto, that requirement may not be universal under the ordinance. Thus, there may be a need under BCDC's standards to make it so. There are also issues relating to the frequency and duration of organized events, which may be incompatible with, and therefore, during their occurrence, may displace unorganized public access activities that are listed in the permit.

You also ask that we agree to add to the PAA a requirement that the Port to conduct "on the 66th anniversary of...the agreement" an assessment of whether the public access provided under the agreement is "the highest and best public trust use of the subject property" and whether, alternatively, "the subject property is needed for [some] public trust use" other than public access. Again, Commission staff is without discretion to insert in a PAA requirements, such as the one you propose, other or different from the requirements specified in the permit.

Even if the language you propose is construed not as a requirement but rather only as a statement of intent on the part of the Port, it still fails to serve any useful purpose. There is one and only one "appropriate and necessary action" that it will be necessary for the Port to take in order "to terminate this agreement and associated deed restriction." That action is to apply for and obtain an amendment to permit no. 1985.019B to remove and delete therefrom the requirement that the public pavilion site be devoted to public access. Under the Commission's regulations (§§ 10800 – 10824) the Port (in conjunction with Scott's as co-permittee) has the ability to apply for such an amendment at any time, including but not limited to the 66th anniversary of the PAA, and for the reason set forth in your language or for any other reason. Inserting into the PAA a statement of the Port's intent to pursue a course of action the availability of which is undisputed under otherwise applicable law seems to us to be unnecessary and superfluous.

For the foregoing reasons we renew our request that the Port agree to execute the public access agreement required by the permit in the form presented to it by counsel for Scott's Restaurant. I am available to discuss further if such further discussion is desired. Thanks.

John

From: Joshua Safran <jsafran@portoakland.com>

Date: Tuesday, June 17, 2014 9:04 PM

To: John Bowers <johnb@bcdcc.ca.gov>

Cc: Ellen Miramontes <ellenm@bcdcc.ca.gov>, Brad McCrea <bradm@bcdcc.ca.gov>, Adrienne Klein <adriennek@bcdcc.ca.gov>, "Peter S. Prows" <pprows@briscoelaw.net>, Julie Braun <jbraun@portoakland.com>, Dorin Tiutin <dtiutin@portoakland.com>

Subject: RE: Scott's Restaurant revised public access instrument

Hi John et al,

In light of our email exchanges with BCDC and your comments below, please find attached the Port Attorney's proposed revisions. I'm happy to further exchange emails, but would also be available for an all-hands call or meeting since that might save time. Joshua

From: John Bowers [<mailto:johnb@bcdcc.ca.gov>]

Sent: Wednesday, June 11, 2014 6:48 PM

To: Joshua Safran

Cc: Ellen Miramontes; Brad McCrea; Adrienne Klein; Peter S. Prows

Subject: Re: Scott's Restaurant revised public access instrument

Joshua,

Upon receipt of your most recent message It was not entirely clear to us how the process of finalizing and recording the Public Access Agreement/Guarantee form (PAA) as required by the Scott's Restaurant/Public Pavilion permit was to move forward. On our side the concerns you have raised regarding the standard form language in our PAA have been the subject of a number of internal meetings. Our further thoughts on the concerns you have raised are the following.

In response to the question you pose in your most recent message, it is difficult to specify precisely how the two related permits that the BCDC has issued for Scott's restaurant (Nos. 1985.019A and 1985.019B) will interact with one another under an almost unlimited range of future scenarios. Nevertheless, we agree that, under the "split permit" format we elected to utilize for Scott's Restaurant, it is indeed possible that Permit No. 1985.019B and the public access requirement contained therein could be extinguished by the elimination of the use of the "public pavilion" site by Scott's or by any other entity operating under the authority of that permit, and by the removal of all improvements associated with that use. However, we hasten to add that any new use that the Port might wish to make of the public pavilion site would in all likelihood trigger the need for a new BCDC permit.

You also ask that we agree to modify the PAA to re-characterize the purpose of the PAA as "public access and public trust" as opposed to simply "public access." Neither I nor any member of the staff of the BCDC has the ability or discretion to agree to language in a PAA that describes a purpose for a public access dedication that deviates in any way from the purpose of that dedication stated in the permit. In this case Special Condition (SC) II.B of Permit No. 1985.019B states that the purpose of the dedication requirement contained therein is "unrestricted public access for walking, sitting, viewing, picnicking, and related purposes as more specifically described in

paragraphs II.B.2." If an applicant such as the Port disagrees with the manner in which a staff recommendation describes the purpose(s) of the public access dedication requirement contained therein, it is incumbent on the applicant to raise that issue when the staff recommendation is before the Commission, not at the PAA drafting stage after the permit has been approved and issued.

You also suggest that "certain types of public access may not be consistent with the public trust." However, we are not concerned with any conceivable form of public access. We are only concerned with the specific forms of public access, noted above, that SC II.B of the permit requires the permittees to dedicate. The Port has agreed in numerous previous permits, most notably in the companion Permit No. 1985.019A for Scott's Restaurant, to the same public access dedication purpose language as that contained in Permit No. 1985.019B. We are aware of no issues that have arisen in connection with any of these previous permits with respect to forms of "public access" that may be considered to be inconsistent with the "public trust." Also, if the Port continues to have concerns over the consistency with the "public trust" of the public access uses required by the permit, we encourage the Port to consider exercising the authority it has under SC II.B.7 of the permit to establish "reasonable rules on use of public access area."

It is my fervent hope that with the foregoing clarifications we can proceed to finalize, execute and record the PAA that was prepared and presented to the Port by counsel for Scott's Restaurant. That having been said, if there are any unresolved or remaining issues that require further discussion, I am happy to participate.

All the best.

John

From: Joshua Safran <jsafran@portoakland.com>

Date: Friday, April 25, 2014 5:20 PM

To: John Bowers <johnb@bcdcc.ca.gov>

Cc: Ellen Miramontes <ellenm@bcdcc.ca.gov>, Brad McCrea <bradm@bcdcc.ca.gov>, Richard Sinkoff <rsinkoff@portoakland.com>, Adrienne Klein <adriennek@bcdcc.ca.gov>, Dave Murtha <dmurtha@portoakland.com>, Julie Braun <jbrown@portoakland.com>, John Briscoe <jbriscoe@briscoelaw.net>, "Peter S. Prows" <pprows@briscoelaw.net>

Subject: RE: Scott's Restaurant revised public access instrument

OK. We need to spell out what the "terms and conditions" of the permit and the authorized "construction" are. I didn't understand the public trust use at issue here (meaning the cause of these BCDC conditions) to be the restaurant, but rather the pavilion and the private exclusive uses of Port common area.

From: John Bowers [<mailto:johnb@bcdcc.ca.gov>]

Sent: Friday, April 25, 2014 5:12 PM

To: Joshua Safran

Cc: Ellen Miramontes; Brad McCrea; Richard Sinkoff; Adrienne Klein; Dave Murtha; Julie Braun; John Briscoe; Peter S. Prows

Subject: Re: Scott's Restaurant revised public access instrument

Joshua,

I think our respective positions are edging closer to one another. If in the exercise of the authority and discretion to which you refer the Port were to determine that "the subject property is needed for other [i.e., other than a restaurant] public trust uses," and, as a result, caused to restaurant to close and the improvements associated with the restaurant to be removed from the property, then BCDC's permit and any requirements imposed by the permit, such as public access, would also terminate. If that is what you are suggesting, that is essentially what the

BCDC's regulations and the dedication instrument provide for.

John

From: Joshua Safran <jsafran@portoakland.com>

Date: Friday, April 25, 2014 4:54 PM

To: John Bowers <johnb@bcdcc.ca.gov>

Cc: Ellen Miramontes <ellenm@bcdcc.ca.gov>, Brad McCrea <bradm@bcdcc.ca.gov>, Richard Sinkoff <rsinkoff@portoakland.com>, Adrienne Klein <adriennek@bcdcc.ca.gov>, Dave Murtha <dmurtha@portoakland.com>, Julie Braun <jbraun@portoakland.com>, John Briscoe <jbriscoe@briscoelaw.net>, "Peter S. Prows" <pprows@briscoelaw.net>

Subject: RE: Scott's Restaurant revised public access instrument

Thanks, that answered my question. The way the Port and State Lands Commission have dealt with this issue in the past has been to include language that provides for a Port option to terminate and a condition similar to the following: On the sixty-sixth anniversary of the recordation of this covenant or as soon thereafter as is reasonably feasible, the Port shall undertake an analysis of the highest and best public trust use of the subject property. If the Port determines that the subject property is needed for other public trust uses, the Port shall immediately exercise its option to terminate this covenant.

If BCDC cannot accept this approach, then we should definitely set up a call and include State Lands in the loop.

All the best,

Joshua

From: John Bowers [<mailto:johnb@bcdcc.ca.gov>]

Sent: Friday, April 25, 2014 4:45 PM

To: Joshua Safran

Cc: Ellen Miramontes; Brad McCrea; Richard Sinkoff; Adrienne Klein; Dave Murtha; Julie Braun; John Briscoe; Peter S. Prows

Subject: Re: Scott's Restaurant revised public access instrument

Joshua,

The durational language in our standard form dedication instrument provide for that instrument to remain in effect for however long the improvements and uses approved by the BCDC remain in existence. As noted in a previous message, this duration can, and often does, last longer than the ownership interest(s) of the initial permittee(s). If the improvements and uses that the BCDC approved in Permit no. 1985.019B last longer than 66 years, then the dedication of public access and the instrument that accomplishes that dedication will also last longer than 66 years.

John

From: Joshua Safran <jsafran@portoakland.com>

Date: Friday, April 25, 2014 4:27 PM

To: John Bowers <johnb@bcdcc.ca.gov>

Cc: Ellen Miramontes <ellenm@bcdcc.ca.gov>, Brad McCrea <bradm@bcdcc.ca.gov>, Richard Sinkoff <rsinkoff@portoakland.com>, Adrienne Klein <adriennek@bcdcc.ca.gov>, Dave Murtha <dmurtha@portoakland.com>, Julie Braun <jbrown@portoakland.com>, John Briscoe <jbriscoe@briscoelaw.net>, "Peter S. Prows" <pprows@briscoelaw.net>

Subject: RE: Scott's Restaurant revised public access instrument

Hi John,

I'm sure you are being clear here, but I'm not understanding the issue. Are you asking the Port to place restrictions on title for a term that may be longer than 66 years?

Thanks,

Joshua

From: John Bowers [<mailto:johnb@bcdcc.ca.gov>]

Sent: Friday, April 25, 2014 4:22 PM

To: Joshua Safran

Cc: Ellen Miramontes; Brad McCrea; Richard Sinkoff; Adrienne Klein; Dave Murtha; Julie Braun; John Briscoe; Peter S. Prows

Subject: Re: Scott's Restaurant revised public access instrument

Joshua,

The standard form language in our public access dedication instrument does not provide for the term of the dedication to be "perpetual." It states that the term of the dedication shall be coterminous with the existence of the improvements and uses that the BCDC has authorized and/or of the permit which evidences such authorization. Our permits and dedication instruments routinely outlive the ownership interests of the party or parties to whom the BCDC initially granted such permits. The language you propose to add to the dedication instrument does not "clarify" its existing language; it overrides it. As such we cannot accept it.

I am also available to discuss, as necessary and appropriate.

John

From: Joshua Safran <jsafran@portoakland.com>

Date: Friday, April 25, 2014 3:10 PM

To: John Bowers <johnb@bcdcc.ca.gov>, "Peter S. Prows" <pprows@briscoelaw.net>

Cc: Ellen Miramontes <ellenm@bcdcc.ca.gov>, Brad McCrea <bradm@bcdcc.ca.gov>, Richard Sinkoff <rsinkoff@portoakland.com>, Adrienne Klein <adriennek@bcdcc.ca.gov>, Dave Murtha <dmurtha@portoakland.com>, Julie Braun <jbrown@portoakland.com>, John Briscoe <jbriscoe@briscoelaw.net>, Dave Murtha <dmurtha@portoakland.com>

Subject: RE: Scott's Restaurant revised public access instrument

Hi John,

The 66-year language was to clarify that the term was not and could not be perpetual. Scott's remaining term

is less than 66 years (something like 27 years), so we would prefer to set the term to be coterminous with the Scott's Lease. We agree that "public access" uses are not equivalent to "public trust" uses, but we do not agree that "public access" uses are only a subset of "public trust" uses as certain types of public access may not be consistent with the public trust. Language that clarifies that uses are limited to only those consistent with both "public access and public trust" uses should work for us if that works for you.

Happy to discuss further, as appropriate, by phone or in person.

Joshua

Joshua Safran

Deputy Port Attorney
Port Attorney's Office
530 Water Street, 4th Floor
Oakland, CA 94607
Phone: (510) 627-1136
Fax: (510) 444-2093

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From: John Bowers [<mailto:johnb@bcdcc.ca.gov>]

Sent: Friday, April 25, 2014 12:46 PM

To: Peter S. Prows

Cc: Ellen Miramontes; Brad McCrea; Richard Sinkoff; Adrienne Klein; Joshua Safran; Dave Murtha; Julie Braun; John Briscoe; Dave Murtha

Subject: Re: Scott's Restaurant revised public access instrument

Peter,

Thank you for this updated version of the public access dedication instrument that is required by special condition II.B.3 of BCDC Permit No. 1985.019B (Scott's Jack London Seafood Restaurant).

Although our review is not complete I would like to address in this message several of the most significant issues raised by the draft instrument that you have provided to us.

The first issue concerns the revisions the Port has made to the legal description of the public access area as contained in proposed Ex. C to the instrument. These revisions all seem to make sense in light of relevant leasehold and other ownership boundaries that affect the area that the permit requires to be dedicated for public access. We concur in them.

The second issue concerns the addition of a provision in the instrument that limits its term to 66 years. We understand that this site is subject to the limitations contained in Civil Code § 718. However, the duration of the BCDC's permits and their requirements, including the public access instrument under consideration, is governed not by the duration of any particular permittee's ownership interest but rather by the duration of the improvements and uses that the permits authorize. See the authorities cited in the relevant provision of the instrument, specifically 14 CCR §§ 10503(c) and (d). At the termination of Scott's 66-year lease any one of a number of developments may occur. The Port could renew its lease to Scott's. The lease may not be renewed in which case either the site will be released to a new lessee or the Port will take possession of the site and its improvements. Finally, the Port, in the exercise of its responsibility and authority as a tidelands grantee, may decide to devote this site to a public trust consistent use other than a restaurant. It will only be as a result of this last (and probably least likely) scenario that the permit and its requirements, including the instrument, will terminate and be of no further force and effect.

Accordingly, imposing an absolute 66-year term on the instrument is inappropriate. (There is one scenario under which a 66-year term for the instrument would be acceptable, namely, if the Port and Scott's were to seek and obtain an amendment to the permit to cause it to expire or terminate in 66 years. (This term would run from the date of initial issuance of the permit, not from the date of approval of the amendment.) Given the multitude of scenarios for the future of this site as outlined above, we see no reason to pursue this strategy.)

We have similar concerns regarding the proposed revision in the language of the NOW THEREFORE clause to change the purpose of the instrument from "public access purposes" to "public trust purposes." We understand that the public trust doctrine encompasses a multitude of maritime oriented purposes and uses, and that the Port, in the exercise of its responsibility and authority as a tidelands grantee, has wide discretion in administering the public trust lands that it owns. However, given the specific project that was presented to it, the BCDC in the exercise of its regulatory authority under the McAteer-Petris Act decided that the site that is to be governed by this instrument is to be devoted to one particular public trust consistent use, and that use is public access. Therefore, to the extent that the proposed language revision suggests that under the instrument public trust consistent uses other than public access may be allowed to occur on this site, it is not acceptable.

Please let me know if you would like to discuss these issues further.

John

From: "Peter S. Prows" <pprows@briscoelaw.net>

Date: Friday, April 18, 2014 8:44 AM

To: Ellen Miramontes <ellenm@bcdca.gov>, Brad McCrea <bradm@bcdca.gov>, Richard Sinkoff <rsinkoff@portoakland.com>, "Steven E. Hanson" <hansonsteven@gmail.com>, John Bowers <johnb@bcdca.gov>, Adrienne Klein <adriennek@bcdca.gov>, 'Steve Fagalde' <stevef@scottscorp.com>, Joshua Safran <jsafran@portoakland.com>, Dave Murtha <dmurtha@portoakland.com>, Julie Braun <jbraun@portoakland.com>, John Briscoe <jbriscoe@briscoelaw.net>, Dave Murtha

[<dmurtha@portoakland.com>](mailto:dmurtha@portoakland.com)

Subject: Scott's Restaurant revised public access instrument

Dear all,

Steve Fagalde and I had a good meeting with BCDC staff yesterday. One of the items we discussed was the public access instrument, including the Port's proposed revisions to the CC&R document and to Exhibit C. The Port's revisions, plus the three exhibits, are attached. Scott's is amenable to whatever CC&R instrument is acceptable to both the Port and BCDC.

Peter

Peter Prows
Briscoe Ivester & Bazel LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
415.402.2708 (direct)
415.994.8991 (cell)
415.398.5630 (fax)

